313 U.S. 57

FILED
APR 30 1941
CHARLES ELMORE CROPLEY
CLERK

IN THE

# Supreme Court of the United States

OCTOBER TERM, A. D. 1940.

No. 1005

ORVILLE J. TAYLOR,

*Petitioner,*

*vs.*

COMMISSIONER OF INTERNAL REVENUE,

*Respondent.*

## PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SEVENTH CIRCUIT.

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JAMES J. MAGNER,
*Attorneys for the Petitioner.*

THE DUNTHORP-WARREN PRINTING COMPANY, 810 WEST JACKSON, CHICAGO

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## PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SEVENTH CIRCUIT.

---

*To the Honorable, the Chief Justice of the United States and the Associate Justices of the Supreme Court of the United States:*

### JUDGMENT SOUGHT TO BE REVIEWED.

Orville J. Taylor, petitioner, by his solicitors, prays that a writ of certiorari issue to review the judgment of the Circuit Court of Appeals for the Seventh Circuit, entered January 31, 1941 (R. 113), affirming a decision of the United States Board of Tax Appeals (R. 81-91).

## STATEMENT OF MATTER INVOLVED.*

At the close of the calendar year 1933, petitioner was the owner of 2,300 shares of the common stock of Studebaker Mail Order Company, a corporation of Illinois, representing an investment of $36,462.50 (R. 18). In June, 1934, at the suit of the Attorney General for the State of Illinois, the corporation was dissolved by a decree of the Superior Court of Cook County, Illinois, for failure to pay franchise taxes (R. 52, 53). Treating that dissolution (preceded in that year by the breakdown of plans of the officers for a reorganization of the corporation) as the identifiable event fixing the year 1934 as the year within which he had, within the meaning of the Revenue Act, *sustained* a loss, the petitioner claimed a deduction in the above-mentioned amount in his income tax return for the year 1934 (R. 63). The Commissioner of Internal Revenue disallowed the deduction and determined a deficiency in taxes against the petitioner in the amount of $8,320.24 on the ground that, in the determination of the Commissioner, the common stock of the Studebaker Mail Order Company had become worthless during the year 1933 and therefore petitioner had *sustained* his loss during that year. On a petition for a redetermination of the deficiency, the Board of Tax Appeals sustained the Commissioner. The Circuit Court of Appeals affirmed. Both affirmances flow from what petitioner conceives to be a misconception of the precise nature of the question presented to the Board of Tax Appeals by the petition for a redetermination of the deficiency.

Tersely stated, to justify the determination that the petitioner's loss was sustained during the year 1933, the Commissioner relied upon: (1) the formation and operation, during 1932 and 1933, of a creditors' committee for Stude-

* The facts appear in more detail in the opinion of the Circuit Court (R. 113-114).

baker Mail Order Company (R. 93); (2) the curtailment of business operations during 1933, called by respondent "cessation from business"; (3) voluntary settlements by Studebaker Mail Order Company with its trade and bank creditors, respectively, at less than the face amount of the debts due them (R. 83, 85); (4) the issuance of a letter during 1933 by the president of the corporation to the shareholders conceding the corporation's retirement from business (R. 78); (5) the delisting, in September 1933, of the corporation's stock issues from the lists of the Chicago Stock Exchange (R. 17).

Petitioner conceded that the foregoing events foreshadowed possible *ultimate* loss but insisted that such events were not indicative of a *present* loss, and, to rebut the inferences to be derived from the foregoing circumstances he pointed to the following: (1) the activities of the corporate officers during 1933 (in which he had participated) looking toward a possible reorganization of the company (R. 34); (2) the fact that there existed an over-the-counter market in the corporate stock after the delisting and during 1933, at prices ranging from 10 cents to 25 cents per share (R. 27, 28); (3) the fact that at the close of 1933 the corporation was still possessed of accounts receivable in the face amount of $580,000 (R. 56) which the undisputed evidence showed had some value after 1933 (R. 37, 38, 44, 45); (4) the retention of an option (not expiring until April 1934) to reacquire corporate real estate conveyed during 1933 to the bank creditors (R. 20, 21); and (5) a certain intangible good will value to the corporate name, attributable to the family name "Studebaker" (R. 22, 43).

It is petitioner's view that the relevant facts subsisting prior to January 1, 1934 were such as to give rise to opposing and conflicting inferences, and that there was no instant prior to January 1, 1934 when the taxpayer could have successfully asserted that the loss was sustained in

any given year; that (for example) there was no clear and convincing evidence of identifiable events that the loss was sustained in 1933 within the meaning of the Revenue Act and consequently that year could not be identified as the year in which his loss was sustained within the meaning of that act and the regulations thereunder; and that the opposing and conflicting inferences relative to the year 1933, which are reasonably to be drawn from the evidence upon the hearing before the Board of Tax Appeals, cannot, as a matter of law (as contended by the Government), constitute evidence that the stock became worthless in 1933.

## JURISDICTION.

The jurisdiction of this court is invoked under Judicial Code, Sec. 240a, 28 U. S. C., Sec. 347a.

The judgment of the Circuit Court of Appeals was entered on January 31, 1941.

## OPINIONS BELOW.

The opinion of the Circuit Court of Appeals (per Sparks, *C. J.*) is published in 117 F. (2d) 189 (R. 113).

The Board of Tax Appeals (per Opper, *M. B.*) filed a memorandum opinion (R. 81-91).

## QUESTIONS PRESENTED.

I.

Can the Commissioner lawfully disallow a deduction on the ground—not that there was not any loss—but that the loss was sustained in a prior year, when the facts in evidence with respect to that prior year do not constitute clear and convincing proof, but, on the contrary, give rise to opposing inferences such as would have prevented the taxpayer from determining that the loss was sustained in such prior year?

II.

Can the Commissioner lawfully disallow a deduction on the ground—not that there was not any loss—but that the loss was sustained in a prior year, when the evidence shows that in that prior year the taxpayer himself could not have determined that the loss was sustained in that year?

III.

Must a taxpayer, in order to establish that a loss was sustained in a given year, prove that the pertinent property had a value in the preceding year, beyond proving such facts as would have prevented the taxpayer from determining that the loss was *sustained* in *any* preceding year?

IV.

Did the Circuit Court of Appeals correctly construe the pertinent statutory provisions?

V.

Do the pertinent statutory provisions as construed by the Circuit Court of Appeals, violate the inhibitions of the Fifth Amendment of the Constitution of the United States?

**REASONS RELIED ON FOR THE ALLOWANCE OF THE WRIT.**

(1) The Circuit Court of Appeals has decided an important question of Federal law which has not been but should be settled by this court, namely: whether, under Sec. 23 of the Revenue Act of 1934, Chap. 277, 48 Stat. 680, and similar provisions in other revenue laws and regulations, the Government may determine that a loss has been sustained by the weight of the evidence and at the same time require that the taxpayer must determine the identical question by clear and convincing proof.

(2) The Circuit Court of Appeals has in this case decided a Federal question in a way probably in conflict with applicable decisions of this court, viz., by deciding that the Board of Tax Appeals may find that a loss was sustained in a given year upon evidence which would not have justified the taxpayer in determining that the loss was sustained in that year.

**SPECIFICATIONS OF ERRORS TO BE URGED.**

(1) The Circuit Court erred in holding that facts which would not have justified the taxpayer in determining that the loss was incurred prior to 1934 did, as a matter of law, support the Commissioner and Board of Tax Appeals in finding that the loss was incurred prior to that year and disallowing the loss in that year.

(2) The Circuit Court erred in holding that a criterion of loss is available to the Government but not to the taxpayer; and that although a taxpayer could not have taken a loss prior to a given year, the Commissioner and Board of Tax Appeals may find that the loss was sustained prior to that year and thereby disallow the loss in that year.

(3) The Circuit Court erred in holding that the Commissioner and Board of Tax Appeals may determine the

year in which the loss was sustained by the *weight of the evidence;* whereas, the taxpayer must base his determination upon *clear and convincing proof.*

(4) The Circuit Court erred in not overruling the decision of the Board of Tax Appeals.

(5) The Circuit Court erred in affirming the decision of the Board of Tax Appeals.

(6) The Circuit Court erred in not holding that petitioner was entitled to a deduction for gross income, in his income tax return for the calendar year 1934, in the sum of $36,462.50, as shown in his return.

## STATUTE INVOLVED.

Revenue Act of 1934, c. 277, 48 Stat. 680:

SEC. 23. DEDUCTIONS FROM GROSS INCOME.

In computing net income there shall be allowed as deductions:

* * * * *

(e) *Losses by Individuals.*—In the case of an individual, losses sustained during the taxable year and not compensated for by insurance or otherwise—

(1) if incurred in trade or business; or

(2) if incurred in any transaction entered into for profit, though not connected with the trade or business; or

(3) of property not connected with the trade or business, if the loss arises from fires, storms, shipwreck, or other casualty, or from theft. * * *

## BRIEF IN SUPPORT OF PETITION.

### POINTS AND AUTHORITIES.

I. A TAXPAYER, IN ORDER TO ESTABLISH A DEDUCTIBLE LOSS, MUST OFFER CLEAR AND CONVINCING PROOF.

*Burnet* v. *Houston*, 283 U. S. 223, 227.

*New Colonial Ice Co.* v. *Helvering*, 292 U. S. 435, 440.

U. S. Treasury Department, Bureau of Internal Revenue, Regulation 77, Article 171.

*U. S.* v. *S. S. White Dental Mfg.* Co., 274 U. S. 398.

*Ewing Thomas Converting Co.* v. *McCaughn*, 43 F. (2) 503, 505.

II. THE EVIDENCE IN THIS CASE SHOWED BEYOND DISPUTE THAT THE FACTS SUBSISTING UNTIL THE YEAR 1934 DID NOT CONSTITUTE CLEAR AND CONVINCING PROOF BUT, ON THE CONTRARY, GAVE RISE TO OPPOSING AND CONFLICTING INFERENCES, SUCH THAT THE TAXPAYER COULD NOT HAVE ESTABLISHED THAT THE LOSS WAS SUSTAINED IN 1933 (THE YEAR SELECTED BY THE COMMISSIONER AND BOARD OF TAX APPEALS) OR ANY OTHER YEAR PRIOR TO 1934.

*Appeal of Williamson Milling Co.*, 5 B. T. A. 814, 818.

*Brill* v. *Commissioner*, 20 B. T. A. 495.

*Ladew* v. *Commissioner*, 22 B. T. A. 443.

*Lyon* v. *U. S.*, 5 Fed. Supp. 138, 139.

*Lawson* v. *Commissioner*, 42 B. T. A. 1103.

III. THE BOARD OF TAX APPEALS AND THE CIRCUIT COURT OF APPEALS ERRONEOUSLY RULED THAT EVIDENCE WHICH WOULD NOT HAVE ENTITLED TAXPAYER TO ESTABLISH THE LOSS IN 1933, WAS SUFFICIENT TO WARRANT THE COMMISSIONER AND THE BOARD OF TAX APPEALS IN FINDING THAT THE LOSS WAS SUSTAINED IN THAT YEAR.

(See argument.)

IV. PETITIONER PROVED THE ORIGINAL COST OF THE STOCK AND FACTS WHICH WOULD HAVE PREVENTED HIM FROM DETERMINING THAT THE LOSS WAS SUSTAINED IN ANY YEAR PRECEDING 1934. THIS WAS SUFFICIENT PROOF THAT THE PERTINENT PROPERTY HAD A VALUE IN THE YEAR 1933.

(See argument.)

V. THE PERTINENT STATUTORY PROVISIONS AS CONSTRUED BY THE CIRCUIT COURT OF APPEALS VIOLATE THE INHIBITIONS OF THE FIFTH AMENDMENT OF THE CONSTITUTION OF THE UNITED STATES.

(See argument.)

VI. CONCLUSION.

84 University of Pennsylvania Law Review, p. 41.

## ARGUMENT.

### I. A TAXPAYER, IN ORDER TO ESTABLISH A DEDUCTIBLE LOSS, MUST OFFER CLEAR AND CONVINCING PROOF.

In those cases where the sole issue presented is whether the taxpayer sustained a loss so as to authorize him to take a deduction in his income tax return, it has been held that such deductions from gross income, being matters of legislative grace, must *clearly* come within the conditions prescribed by the statute. *Burnet* v. *Houston*, 283 U. S. 223, 227; *New Colonial Ice Co.* v. *Helvering*, 292 U. S. 435, 440. Treasury regulations have provided that losses "must usually be evidenced by closed and completed transactions." Art. 171, Reg. 77. This court has said that such losses may usually be fixed by identifiable events. *U. S.* v. *S. S. White Dental Mfg. Co.*, 274 U. S. 398, 401. The rationale of the decisions on the subject is all to the effect that such deductions, being matters of grace, must be clearly established by the taxpayer by definite and precise evidence. If he fails to do that his claim for a deduction falls. *Burnet* v. *Houston*, 283 U. S. 223, 227.

II. THE EVIDENCE IN THIS CASE SHOWED BEYOND DISPUTE THAT THE FACTS SUBSISTING UNTIL THE YEAR 1934 DID NOT CONSTITUTE CLEAR AND CONVINCING PROOF BUT, ON THE CONTRARY, GAVE RISE TO OPPOSING AND CONFLICTING INFERENCES, SUCH THAT THE TAXPAYER COULD NOT HAVE ESTABLISHED THAT THE LOSS WAS SUSTAINED IN 1933 (THE YEAR SELECTED BY THE COMMISSIONER AND BOARD OF TAX APPEALS) OR ANY OTHER YEAR PRIOR TO 1934.

Here, there was no question whether the petitioner sustained a loss—that was not an issue. The petitioner claimed that within the meaning of the Revenue Act he sustained his loss in 1934; the Commissioner contended that the loss was sustained in an earlier year—1933. The issue thus posed for the determination of the Board of Tax Appeals was not quite the same as in the conventional loss case, for, implicit in the Commissioner's disallowance of the deduction in 1934, on the ground that it was sustained in 1933, lies the contention that during 1933 events had taken place, which were either "closed transactions" or "identifiable events" having such an air of finality and precision that they fixed that year as the year in which petitioner's loss was sustained. Thus, it is submitted, a burden which normally rests on the taxpayer in the conventional loss case was assumed, by the very nature of his determination, by the Commissioner in this case. *And, to sustain his determination, the Commissioner should be able to point to evidence of occurrences during 1933 having such finality and precision that they identified that year as the year in which the loss was sustained—evidence so definite that it bound the taxpayer to take the loss in that year, and would have sustained the taxpayer had he claimed the loss in his return for that year.*

But here the evidence for that year is evenly balanced. Conflicting and opposing inferences can be reasonably

drawn therefrom. Petitioner submits that the presumption of correctness which usually attends the determination of the Commissioner cannot, on the issue before the Board of Tax Appeals in this case, be availed of to supply something the evidence lacks. *If that were the case, a taxpayer would have to judge occurrences not by what they mean in law, but by what an administrative official might think they indicate.*

Under such interpretation of the law a taxpayer would always be at the mercy of the Commissioner in situations like that involved in this case. The taxpayer could not take a loss in any year in which, in the opinion of the Commissioner, there was not *clear and convincing proof;* nor could he take it in any year later than the one in which the Commissioner ruled that the *weight of the evidence* established that the loss was incurred.

III. THE BOARD OF TAX APPEALS AND THE CIRCUIT COURT OF APPEALS ERRONEOUSLY RULED THAT EVIDENCE WHICH WOULD NOT HAVE ENTITLED TAXPAYER TO ESTABLISH THE LOSS IN 1933, WAS SUFFICIENT TO WARRANT THE COMMISSIONER AND THE BOARD OF TAX APPEALS IN FINDING THAT THE LOSS WAS SUSTAINED IN THAT YEAR.

In this case, tersely stated, the Commissioner pointed to: (1) the formation and operation of a creditors' committee (R. 93); (2) the curtailment of business operations; (3) voluntary settlements with trade and bank creditors (R. 83, 85); (4) a letter from the president of the corporation to its shareholders (R. 78); and (5) the delisting of the stock from an exchange list (R. 17), as indicative of the fact that the stock owned by the petitioner had in fact become worthless during 1933. *But both the Commissioner and the Board, it is submitted, have given an erroneous probative effect to such evidence. As a matter of law, it is submitted that a trier of the fact can only find a threat of*

*ultimate loss,—and not present loss,—from such facts.* The mere fact that a receivership has been in control of the business is not sufficient to prove the worthlessness of an investment. *Appeal of Williamson Milling Co.*, 5 B. T. A. 814, 818. An irregular adjudication in bankruptcy does not indicate worthlessness in the year of the adjudication. *Brill* v. *Commissioner*, 20 B. T. A. 495. The fact that a corporation is in the hands of a creditors' committee for three years prior to actual liquidation does not establish worthlessness. *Ladew* v. *Commissioner*, 22 B. T. A. 443. The appointment of a receiver, or even a showing of bankruptcy, is not sufficient to entitle a taxpayer to deduct the cost of the stock as worthless. *Lyon* v. *U. S.*, 5 Fed. Supp. 138, 139. *These decisions all hold that the evidence relied on by the Commissioner foreshadows possible ultimate loss, but does not identify a present loss.*

Furthermore, the foregoing facts were opposed and rebutted by (1) activities of the corporate officers (in which petitioner participated) during 1933 contemplating a possible reorganization of the company—admittedly never achieved (R. 34); (2) the existence during 1933 of a small over-the-counter market in the Studebaker Mail Order stock at prices ranging from ten to twenty-five cents per share (R. 27, 28); (3) the fact that, although there was a deficiency in the balance sheet, the corporation at the close of 1933 was possessed of accounts receivable in the face amount of $580,000 (which the undisputed evidence showed had some value after 1933) (R. 37, 38, 44, 45), with no debts to speak of; (4) the retention of an oral option good until 1934, to reacquire corporate real estate conveyed during 1933 to the bank creditors (R. 20, 21); and (5) a certain intangible good will value arising out of the name "Studebaker" (R. 22, 43). These events, petitioner submits, as a matter of law, placed the year 1933 in a state of balance. *Since reasonable-minded individuals might draw contrary inferences from all the evidence with respect to that year,*

*the petitioner was therefore not clearly entitled to take the loss at the close of 1933.* Conversely, the Commissioner is likewise bound. *The true burden, and the only burden, resting on the petitioner at the hearing before the Board of Tax Appeals was that of showing this balancing of the facts and it was sufficient as a matter of law to rebut the correctness of the Commissioner's determination of a deficiency.* In other words, by showing the *absence* of *closed transactions* and the *absence* of identifiable events in 1933 the taxpayer had sufficiently rebutted the correctness of the Commissioner's determination as a matter of law to entitle him to have the propriety of his return accepted.

## IV. PETITIONER PROVED THE ORIGINAL COST OF THE STOCK AND FACTS WHICH WOULD HAVE PREVENTED HIM FROM DETERMINING THAT THE LOSS WAS SUSTAINED IN ANY YEAR PRECEDING 1934. THIS WAS SUFFICIENT PROOF THAT THE PERTINENT PROPERTY HAD A VALUE IN THE YEAR 1933.

The Board of Tax Appeals held:

> "From the details set out in full in our findings of fact it seems apparent that petitioner's stock in the Studebaker Mail Order Company became worthless prior to 1934. Certainly the evident condition of the company, coupled with petitioner's own estimate of the value of the securities, as shown by his sales in 1933, *require the conclusion that he has failed to sustain his burden of proving that there was any value whatever remaining at any time in the year 1934* [*1933*]. On this issue respondent is sustained." (Italics supplied.)

It is submitted that the effect of that holding was to place too great a burden of proof on the petitioner in the hearing before the Board. *It is submitted further, that all petitioner needed to show, to meet the precise issue presented by the petition and the Commissioner's answer, was that the events of 1933 lacked finality and definiteness*

*so as to enable or require him to take the loss at the end of that year.*

Petitioner concedes that it is the function of the Board of Tax Appeals to weigh the evidence, make findings of fact, and that its decisions, when supported by substantial evidence, are to be sustained by the courts. But, whether evidence is substantial is a question to be decided by the courts, and that question must be answered with reference to the nature of the issue to which the proffered evidence be relevant. Where, as here, a determination (*i. e.,* that the loss was sustained in a prior year) requires clear and convincing evidence to support it, but is sought to be sustained by evidence which is evenly balanced, then that determination, it is submitted, is not, as a matter of law, sustained by substantial evidence within the meaning of the Revenue Act.

As illustrative of the divergent views which the Board itself draws from evidence virtually identical with that of the case at bar, we refer to the case of *Lawson* v. *Commissioner,* 42 B. T. A. 1103 (promulgated October 30, 1940, Docket No. 99,300). There the taxpayer claimed a loss for worthless stock in his return for the year 1936. The Commissioner disallowed the deduction on the ground that the stock became worthless in fact in some year prior to 1936. The evidence showed that: (1) the companies in which that taxpayer held his stock encountered financial difficulties in 1932 and a receiver was appointed for the companies during that year; (2) in 1934, proceedings for reorganization were instituted in the federal courts; (3) later, in 1934, the companies were adjudicated insolvent; (4) the financial statement of the companies showed a balance sheet deficit of $2,503,499.74 in the year 1934; (5) various plans for reorganization at first proposed to allow the taxpayer and other stockholders some stock in new companies for their stock in the insolvent companies, but in 1936 the final and approved plans for reorganiza-

tion gave the taxpayer nothing. (All of these facts are virtually identical with those of the case at bar except that there were no court proceedings for the Mail Order company.) The taxpayer claimed his loss in the year 1936. In the *Lawson* case the Board of Tax Appeals held that all of the events pointed to by the Commissioner indicated "imminence of loss, not present fact of loss," and cited in support of the Board's decision the very cases we have referred to earlier in this petition. That case is illustrative of the unjust and confusing results bound to follow from divergent views of the precise nature of the question which is presented where the Commissioner disallows a loss on the ground that the loss was in fact sustained in a *prior year*. When the Commissioner disallows a conceded loss, it is submitted that *he* assumes a burden of establishing that the events of the prior year or years were of such conclusive and definite finality that they *bound* the taxpayer to take his loss in that year.

If the decision of the Circuit Court of Appeals in this matter is sound, a taxpayer may determine that the loss has been sustained only upon *clear and convincing* proof; whereas, the Government may determine that the loss was sustained earlier by him by the *weight of the evidence*. The inevitable result will be such cases of injustice as the present one, in which the taxpayer, after acting in good faith, finds that the Government insists that he sustained the loss in a year in which he himself could not have determined it.

## V. THE PERTINENT STATUTORY PROVISIONS AS CONSTRUED BY THE CIRCUIT COURT OF APPEALS VIOLATE THE INHIBITIONS OF THE FIFTH AMENDMENT OF THE CONSTITUTION OF THE UNITED STATES.

We submit that the pertinent statutory provisions, if construed in accordance with the decision of the Circuit Court of Appeals in this case, violate the inhibition of the

Fifth Amendment of the Constitution of the United States providing that "No person shall * * * be deprived of * * * property, without due process of law."

## VI. CONCLUSION.

The inequities inherent in the principles underlying the decision of the Circuit Court of Appeals in this case are remarked by Professor Robert C. Brown of the Law School of Indiana University in an article in Volume 84 of Pennsylvania Law Review entitled "The Time for Taking Deductions for Losses and Bad Debts for Income Tax Purposes," from which article we quote the following apposite comment (page 41):

> "In view of the difficulty of recognizing and sometimes of even knowing about such deductions—a difficulty which confronts nearly every taxpayer more or less frequently—it would appear that these deductions should be determined at least in the first instance, upon a practical rather than a purely theoretical basis. The remark of Judge Learned Hand that 'taxes, like other human affairs, must be determined without the gift of divination,' should be given especial weight under these circumstances. This theory assumes that the taxpayer should determine, in the first instance, the proper date for taking the deduction, and that he should not be reversed by the Bureau of Internal Revenue unless his decision was not merely mistaken as it now appears (with the added advantage of hindsight), but that it was clearly unreasonable and unfair at the time at which he was compelled to make his decision. As will presently appear, however, a considerable tendency has been directly the opposite. The position of the Bureau has generally been that such deductions—at least for losses—can and must be taken by the taxpayer according to what were the *actual facts as now appearing rather than on the basis of what he knew, or could reasonably have been expected to know, at the time.* Even when it is yet a matter of real dispute, the Bureau apparently thinks

that the taxpayer is bound to know not merely all the facts but what the Bureau itself will think the facts to mean. All this is more reminiscent of medieval metaphysics than of the practical common sense which is reasonably to be expected of men engaged in the very practical activity of administering an important revenue measure in a modern and highly organized state; nevertheless, such is the actual trend. Even attempts of Congress—notably in the Revenue Acts of 1921 and 1924—to liberalize the situation as to losses to some degree have been given little weight by the Bureau, which is still generally committed to its highly metaphysical standpoint in this matter.

"However, the Board of Tax Appeals, and even more clearly the courts, have often taken a somewhat less rigid, and therefore more practical and fairer, point of view. But even these supposedly more impartial tribunals are still more or less under the influence of the same metaphysical ideas. Even yet many courts give little more than lip service to the frequently and explicitly phrased idea that taxation is a practical matter. The present statement of the Circuit Court of Appeals for the Seventh Circuit that 'the decisions do not appear always to be consistent' (*Commissioner of Internal Revenue* v. *Highway Trailer Co.*, 72 F. (2d) 913, 914 (C. C. A. 7th, 1934) rev'g 28 B. T. A. 792 (1933), is certainly far from an exaggeration of the situation." (Italics ours.)

WHEREFORE, petitioner prays that a writ of certiorari issue for the review of the decision of the Circuit Court of Appeals for the Seventh Circuit.

Respectfully submitted,

JOHN S. MILLER,
JAMES J. MAGNER,
*Attorneys for Petitioner.*

Chicago, Illinois,
April 28, 1941.

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# In the Supreme Court of the United States

OCTOBER TERM, 1940

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No. 1005

ORVILLE J. TAYLOR, PETITIONER

*v.*

GUY T. HELVERING, COMMISSIONER OF INTERNAL REVENUE

---

*ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SEVENTH CIRCUIT*

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## BRIEF FOR THE RESPONDENT IN OPPOSITION

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### OPINIONS BELOW

The Memorandum Opinion of the Board of Tax Appeals (R. 90–91) is unreported. The opinion of the Circuit Court of Appeals (R. 113–117) is reported in 117 F. (2d) 189.

### JURISDICTION

The judgment of the Circuit Court of Appeals was entered on January 31, 1941 (R. 118). The petition for a writ of certiorari was filed on April 30, 1941. The jurisdiction of this Court is in-

voked under Section 240 (a) of the Judicial Code as amended by the Act of February 13, 1925.

### QUESTIONS PRESENTED

The Board of Tax Appeals held that a loss occurred in a different year than claimed by the taxpayer in this proceeding. The questions are—

1. Whether the evidence supporting the Board's decision is less definite than would have been required of the taxpayer if he had claimed the loss for the year in which the Board held it occurred.

2. If not, whether petitioner has been deprived of his property without due process of law.

### STATUTE INVOLVED

Revenue Act of 1934, c. 277, 48 Stat. 680:

> SEC. 23. DEDUCTIONS FROM GROSS INCOME.
> In computing net income there shall be allowed as deductions:
>
> * * * * *
>
> (e) *Losses by Individuals.*—In the case of an individual, losses sustained during the taxable year and not compensated for by insurance or otherwise—
>
> (1) if incurred in trade or business; or
>
> (2) if incurred in any transaction entered into for profit, though not connected with the trade or business; or
>
> * * * * *
>
> [U. S. Code, Title 26, Sec. 23.]

STATEMENT

The petitioner is a practicing attorney, and was a director, vice president, and general counsel of the Studebaker Mail Order Company, a holding company which owned practically all of the stock of the South Bend Watch Company, the Studebaker Watch Company, and two other companies. He was given 1,000 shares of the common stock of the Mail Order Company in 1924, and thereafter bought 2,300 additional shares, paying a total of $36,462.50 for them (R. 82).

Beginning with the year 1930, the Mail Order Company lost money. By 1932 its losses totaled over $1,200,000 (R. 83). Early in 1932 the affairs of the company had reached such a state that a creditors' committee composed of the trade creditors took charge and remained in charge until the summer of 1933. With such funds as it could obtain from collecting accounts receivable and auctioning certain machinery, the committee paid off the trade creditors fifty cents on the dollar (R. 83). From 1932 the Mail Order Company and its subsidiaries carried on no active business, but, on the contrary, were in the process of liquidation (R. 83). Pressed by bank creditors for the repayment of their loans, the company, in April, 1933, deeded its entire plant and equipment at South Bend to one of the banks for the benefit of the others. An oral agreement permitting repurchase within one year

at a figure equal to the amount of the loans involved was never taken advantage of (R. 85).

By the middle of 1933 the Mail Order Company was for all practical purposes entirely shorn of its assets (R. 83–85). In his communication (R. 78–80) to the stockholders dated June 15, 1933, the president of the company, in what he termed "in the nature of a final report," conceded its collapse. Three months later the company's stock was ordered delisted from the Chicago Stock Exchange (R. 89).

A few isolated sales of the company's stock took place during the period 1932 to June 1934, but these sales were at only nominal figures and the exact details thereof are not of record (R. 20, 27–28, 30–31, 49–50, 76, 89). Petitioner sold 1,000 shares on November 20, 1933, for $25, to enable him to establish a loss (R. 89). Prior to the close of 1933, the liquidating value of the petitioner's common stock had been completely wiped out (R. 84, 86, 88). Likewise, the stock had lost its so-called potential value. On June 25, 1934, the Mail Order Company was dissolved (R. 89).

The Commissioner ruled that the petitioner's 2,300 shares of common stock became worthless, in fact, in 1933, and not in 1934, the year the petitioner seeks a deduction for his loss.

Upon appeal to the Board of Tax Appeals the Board sustained the Commissioner's determination. The Circuit Court of Appeals affirmed the Board's decision.

## ARGUMENT

This case concerns a loss which the petitioner claims occurred in 1934, but which the Commissioner of Internal Revenue and the Board of Tax Appeals held occurred in an earlier year. The Circuit Court of Appeals held that the Board's decision is supported by the evidence. The petition is based upon the assumption that the evidence which the Circuit Court of Appeals held to be sufficient support for the decision of the Board of Tax Appeals, would have been held insufficient had the taxpayer asserted a claim of loss in a prior year.

There is no support in the record for such assumption. Decisions in other cases involving different factual situations (Pet. 12–13) are obviously inconclusive. What the result would have been had petitioner sought a deduction in 1933 is wholly speculative. It does not appear that any court has denied petitioner a claim for an earlier year based upon the same evidence which has been held to be sufficient to support the determination of the Board of Tax Appeals. It does appear that petitioner sold 1,000 shares of the same stock in 1933 at two and a half cents a share "to enable petitioner to establish a loss" (R. 89).

While petitioner has failed to establish that he would be unable to prove a deductible loss in a year prior to 1934, it is apparent that if he could demonstrate that an additional burden would thus

be imposed upon him, it would be occasioned by the rules that the Commissioner's determination is *prima facie* correct and that the taxpayer has the burden of proof. These rules are well settled and present no question for review.

In any event, no question could arise under the Fifth Amendment. Petitioner claims a deduction, which this Court has repeatedly recognized is a matter of legislative grace. *New Colonial Co.* v. *Helvering,* 292 U. S. 435, 440. Therefore petitioner has no legal right to a deduction and no standing to complain of the quantum of proof required of one who seeks such a privilege. Cf. *Perkins* v. *Lukens Steel Co.,* 310 U. S. 113, 125; *Tennessee Power Co.* v. *T. V. A.,* 306 U. S. 118, 137–138.

## CONCLUSION

The petition presents no question which this Court should review; it should therefore be denied.

Respectfully submitted.

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MAY 1941.

U. S. GOVERNMENT PRINTING OFFICE: 1941